Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

6 March 2025 *

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Protection of persons who report breaches of Union law – Directive (EU) 2019/1937 – Article 26(1) and (3) – Failure to transpose and communicate transposition measures – Article 260(3) TFEU – Application for the imposition of a lump sum – Criteria for establishing the amount of the penalty – Automatic application of a coefficient for seriousness)

In Case C-152/23,

ACTION for failure to fulfil obligations under Article 258 and Article 260(3) TFEU, brought on 13 March 2023,

**European Commission**, represented by J. Baquero Cruz and M. Salyková, acting as Agents,

applicant,

v

**Czech Republic**, represented by T. Müller, J. Očková, M. Smolek and J. Vláčil, acting as Agents,

defendant,

supported by:

**Kingdom of Belgium,**

intervener,

THE COURT (Sixth Chamber),

composed of T. von Danwitz, Vice-President of the Court, acting as President of the Sixth Chamber, A. Kumin and I. Ziemele (Rapporteur), Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Czech.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 By its action, the European Commission claims that the Court should:

– declare that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ 2019 L 305, p. 17), and by failing to communicate those provisions to the Commission, the Czech Republic has failed to fulfil its obligations under Article 26(1) and (3) of that directive;

– order the Czech Republic to pay the Commission a lump sum corresponding to the higher of the following two amounts:

  – a daily flat-rate amount of EUR 4 900 multiplied by the number of days between the day after the expiry of the deadline for transposition of Directive 2019/1937 fixed therein and the day on which the infringement comes to an end or, failing regularisation, the date on which the judgment in the present case is delivered;

  – a minimum flat-rate amount of EUR 1 372 000;

– in the event that the failure to fulfil obligations established in the first indent persists until the date of delivery of the judgment in the present case, order the Czech Republic to pay to the Commission a penalty payment of EUR 19 110 per day of delay from the date of delivery of that judgment until the date on which the Czech Republic fulfils its obligations under Directive 2019/1937; and

– order the Czech Republic to pay the costs.

## Legal context

### *Directive 2019/1937*

2 Recital 1 of Directive 2019/1937 states:

‘… potential whistleblowers are often discouraged from reporting their concerns or suspicions for fear of retaliation. In this context, the importance of providing balanced and effective whistleblower protection is increasingly acknowledged at both [European] Union and international level.’

3 Under Article 1 of that directive:

‘The purpose of this Directive is to enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law.’

4 Article 26 of that directive provides:

‘1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 17 December 2021.

…

3. When Member States adopt the provisions referred to in paragraphs 1 and 2, those provisions shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made. They shall forthwith communicate to the Commission the text of those provisions.’

### *The 2023 Communication*

5 Communication 2023/C 2/01 from the Commission, entitled ‘Financial sanctions in infringement proceedings’ (OJ 2023 C 2, p. 1; ‘the 2023 Communication’), devotes points 3 and 4 thereof to the ‘penalty payment’ and the ‘lump sum payment’, respectively.

6 Point 3.2 of the 2023 Communication, which concerns the application of the coefficient for seriousness when calculating the daily penalty payment, provides:

‘An infringement concerning a … failure to notify measures transposing a directive adopted under a legislative procedure is always considered serious. To adapt the amount of the penalty to the specific circumstances of the case, the Commission determines the coefficient for seriousness on the basis of two parameters: the importance of the Union rules breached or not transposed and the effects of the infringement on general and particular interests.

…’

7 Point 3.2.2 of that communication states:

‘For actions brought under Article 260(3) TFEU, the Commission systematically applies a coefficient for seriousness of 10 in case of a complete failure to notify transposition measures. In a Union based on the respect of the rule of law, all legislative directives are to be considered of equal importance and require complete transposition by the Member States within the deadlines that they set.

In the case of a partial failure to notify transposition measures, the importance of the transposition gap is to be considered when setting the coefficient for seriousness which is lower than 10. In addition, the effects of the infringement on general and particular interests may be taken into account …’

8 Under point 3.3 of that communication, entitled ‘Application of the coefficient for duration’:

‘…

The coefficient for duration is expressed as a multiplier of between 1 and 3. It is calculated at a rate of [0.10] per month from the date of the first judgment or from the day following the expiry of the deadline for transposition of the directive in question.

…’

9 Point 3.4 of that communication, entitled ‘Member State’s capacity to pay’, provides:

‘…

The level of sanction required to serve as a deterrent will vary according to Member States’ capacity to pay. This deterrent effect is reflected in the n factor. It is defined as a weighted geometric average of the gross domestic product (GDP) of the Member State concerned compared to the average of the Member States’ GDPs, with a weight of two, and of the population of the Member State concerned, compared to the average of Member States’ populations, with a weight of one. This represents the capacity to pay of the Member State concerned in relation to the other Member States’ capacity to pay:

$$\text{n factor} = \left(\frac{\text{GDP}_\text{n}}{\text{GDP}_\text{avg}}\right)^{2/3} \times \left(\frac{\text{Pop}_\text{n}}{\text{Pop}_\text{avg}}\right)^{1/3}$$

…

The Commission has decided to revise its method for calculating the n factor, which now predominantly relies on Member States’ GDP and secondarily on their population as a demographic criterion allowing a reasonable deviation between the various Member States to be maintained. Taking into account Member States’ population for one third of the calculation of the n factor reduces to a reasonable degree the variation of Member States’ n factors, as compared to a calculation based solely on Member States’ GDP. It also adds an element of stability in the calculation of the n factor, since population is unlikely to vary significantly on an annual basis. In contrast, a Member State’s GDP might experience higher annual fluctuations, in particular in periods of economic crisis. At the same time, since the Member State’s GDP still accounts for two thirds of the calculation, it remains the predominant factor for the purposes of assessing its capacity to pay.

…’

10 Point 4.2 of the 2023 Communication sets out the calculation method for the lump sum as follows:

‘The lump sum is calculated in a manner broadly similar to the method for calculating the penalty payment, that is:

– multiplying a flat-rate amount by a coefficient for seriousness,

– multiplying the result by the n factor,

– multiplying the result by the number of days the infringement persists …

…’

11 Point 4.2.1 of that communication provides:

‘To calculate the lump sum, the daily amount is to be multiplied by the number of days the infringement persists. The latter is defined as follows:

…

– for actions brought under Article 260(3) TFEU, this is the number of days between the day after the expiry of the deadline for transposition set out in the directive at issue and the date the infringement comes to an end, or, failing compliance, the date of the delivery of the judgment under Article 260 TFEU.

…’

12 According to point 4.2.2 of that communication:

‘For the calculation of the lump sum, the Commission applies the same coefficient for seriousness and the same fixed n factor as for the calculation of the penalty payment …

The flat-rate amount for the lump sum is lower than for penalty payments. …

The flat-rate amount applicable for the lump sum is set out in point 2 of … Annex I.

…’

13 Annex I to that communication, entitled ‘Data used for determining financial sanctions proposed to the Court’, provides, in point 2 thereof, that the flat-rate amount for the lump sum payment mentioned in point 4.2.2 of the 2023 Communication is fixed at EUR 1 000 per day, that is one third of the flat-rate for penalty payments, and, in point 3 thereof, that the ‘n’ factor for the Czech Republic is set at 0.49. In point 5 of that Annex I, it is stated that the minimum lump sum fixed for the Czech Republic amounts to EUR 1 372 000.

**The pre-litigation procedure and the procedure before the Court**

14 On 27 January 2022, the Commission sent a letter of formal notice to the Czech Republic, criticising it for having failed to communicate to it all the laws, regulations or administrative provisions necessary to comply with Directive 2019/1937, the transposition deadline of which had expired on 17 December 2021. In its reply of 21 March 2022, the Czech Republic notified various measures which it claimed partially transposed that directive. In addition, in its reply of 25 March 2022, that Member State stated that two measures under preparation would complete the transposition process at the end of the first half of 2023. Those replies were accompanied by an explanatory document which indicated inter alia, for each provision of the said directive, the national provision or provisions which transposed it.

15 With no subsequent communication relating to the transposition of Directive 2019/1937 having been sent, the Commission, on 15 July 2022, addressed a reasoned opinion to the Czech Republic, calling on it to comply with its obligations under that directive within a period of two months of receipt of that opinion.

16 In its reply to that opinion of 9 September 2022, the Czech Republic stated that it regarded Directive 2019/1937 as having been partially transposed by the measures which it had notified to the Commission to date, as well as by the administrative practice of the national authorities. That Member State also stated that certain provisions of that directive did not in any event require specific transposition measures. It also recalled that the law transposing the said directive would be adopted at the end of the first half of 2023.

17 On 14 September 2022, the Czech Republic communicated additional transposition measures to the Commission as well as an updated version of the explanatory document. In its additional reply to the reasoned opinion of 1 December 2022, it also informed it that the draft laws necessary for full and effective transposition had been submitted to the national legislature on 30 November 2022.

18 Taking the view that that Member State had still not complied with its obligations, the Commission decided, on 13 March 2023, to bring the present action before the Court.

19 On 20 and 21 June 2023, the Czech Republic notified to the Commission additional measures transposing Directive 2019/1937, in particular zákon č. 171/2023 Sb., o ochraně oznamovatelů (Law 171/2023 on the protection of whistleblowers) and zákon č. 172/2023 Sb., kterým se mění některé zákony v souvislosti s přijetím zákona o ochraně oznamovatelů (Law 172/2023 amending certain laws in the context of the adoption of the Law on the protection of whistleblowers). Both laws entered into force on 1 August 2023.

20 By decision of the President of the Court of 18 October 2023, the Kingdom of Belgium was granted leave to intervene in support of the form of order sought by the Czech Republic.

21 By decision of the President of the Court of 19 December 2023, the proceedings were stayed pending delivery of the judgment in Case C-147/23. Following the delivery of the judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)* (C-147/23, EU:C:2024:346), the proceedings in the present case were resumed by decision of the President of the Court of the same day.

22 By document of 28 May 2024, the Commission informed the Court that the transposition of Directive 2019/1937 by the Czech Republic could be deemed to have been completed on 1 August 2023. Accordingly, that institution, first, partially abandoned its action, withdrawing its application for the imposition of a penalty payment, and, second, modified its head of claim seeking an order that that Member State pay a lump sum, claiming, on that basis, an amount of EUR 2 895 900.

## The action

### *Failure to fulfil obligations under Article 258 TFEU*

*Arguments of the parties*

23 The Commission points out that, in accordance with the third paragraph of Article 288 TFEU, Member States are required to adopt the provisions necessary to transpose directives into their national legal system, within the periods laid down in those directives, and to communicate those provisions to it immediately.

24 That institution explains that the question whether a Member State has failed to fulfil those obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion which the Commission addressed to that Member State.

25 In the case at hand, the Czech Republic had not adopted the laws, regulations and administrative provisions necessary to transpose Directive 2019/1937 or inform the Commission of their adoption before the expiry of the period laid down in the reasoned opinion of 15 July 2022.

26 In that regard, the provisions notified by the Czech Republic during the pre-litigation procedure, which were adopted before the entry into force of Directive 2019/1937, cannot constitute an adequate transposition of that directive, having regard to their general scope and to the absence of any reference in them to that directive. Thus, none of the notified provisions contains specific measures designed to protect whistleblowers as the said directive requires.

27 Moreover, the Commission points out that an administrative practice cannot equate to a transposition of the provisions of a directive in view of the requirements of stability and legal certainty which characterise their implementation by the Member States.

28 The Czech Republic acknowledges that Directive 2019/1937 was not fully transposed into national law by the expiry of the period laid down in the reasoned opinion, stating that the law permitting such transposition had to be adopted within the days following the lodging of the defence.

29 That Member State, however, disputes both the admissibility of the action and its merits.

30 Thus, first, the Commission altered the subject matter of the dispute at the stage of the application. The failure to fulfil obligations complained of by the present action differs from that which had been defined in the reasoned opinion, since the Commission did not take account of the partial transposition provisions sent before the reasoned opinion had been notified, even though it did not call into question their relevance, as is apparent from the very wording of the reasoned opinion. In so doing, the Commission failed to establish precisely the extent of the failure to fulfil obligations complained of and infringed the Czech Republic's rights of defence.

31 Second, the action is unfounded as regards the provisions of Directive 2019/1937 which were transposed by the provisions notified by the Czech Republic and by certain administrative practices. The general nature of certain of those notified provisions – which that Member State does not dispute – does not mean that they were unable to implement that directive adequately. The Czech Republic submits that, out of a total of 29 articles of that directive, it identified 102

provisions which had to be assessed in the light of the need to transpose them into national law. It states that 49 of them are transposed on the basis of existing legislation and that 23 were considered irrelevant from the point of view of transposition. The failure to fulfil obligations must therefore be limited to 30 provisions.

32 First of all, nařízení vlády č. 145/2015 Sb., o opatřeních souvisejících s oznamováním podezření ze spáchání protiprávního jednání ve služebním úřadu (Government Regulation 145/2015 on the provisions relating to the reporting of suspected unlawful conduct in the performance of duties), sent to the Commission by the Czech Republic, enables 28 provisions of Directive 2019/1937 to be implemented as regards whistleblowers covered by civil service law, in particular Articles 1 and 6 as well as Article 5(11) and Article 19 of that directive.

33 Next, as regards whistleblowers who are not covered by civil service law, a minimum level of protection is guaranteed by the general legal framework constituted, inter alia, by the Criminal Code, the Civil Code, the Code of Administrative Procedure and the Labour Code. The Czech Republic considers that the specific provisions of that legal framework allow for the transposition of, inter alia, Article 3(1), Article 5(5), (7) and (9), Article 11(6), Article 12(1) to (3) and (5), Article 16(2) and (4), Article 20(1) and (2), Article 21(5), (6) and (8), Article 22 and Article 23(1) and (2) of Directive 2019/1937.

34 Last, the Czech Republic considers that Article 1, Article 2(2), Article 3(4), Article 8(7), (8) and (9), second and third subparagraphs, Article 11(3) to (5), Article 15(2), Article 17, Article 21(4), Article 25, Article 26(1), Articles 27 to 29 and Parts I and II of the annex to Directive 2019/1937 are irrelevant from the point of view of transposition, such that their transposition into national law is not necessary.

35 In its reply, the Commission states, first of all, that it is apparent from both the reasoned opinion and the application that it is criticising the Czech Republic for failing to adopt a specific measure transposing Directive 2019/1937. It therefore did not alter the subject matter of the dispute at the application stage.

36 Next, the Commission recalls that the adoption of a specific transposition measure, referring to the directive to be transposed, is a requirement enabling citizens and legal persons to ascertain the full extent of their rights under that directive.

37 Last, the Commission states that it cannot be ruled out that the specific transposition measure refers to an existing piece of legislation. However, having regard to the duty of sincere cooperation incumbent on the Member States, it would not be acceptable for a Member State, acknowledging a delay in the transposition of a directive, to communicate to the Commission, at the stage of the pre-litigation procedure, various national acts of a general nature which are not specifically aimed at the directive to be transposed. The Commission notes that the effectiveness of its action necessarily suffers from such conduct.

38 In its rejoinder, the Czech Republic, referring to the reasoned opinion, reiterates, first, its complaint relating to the alteration of the subject matter of the failure to fulfil obligations, since it is clear from that opinion and from the procedure which preceded it that the Commission considered that that Member State had partially transposed Directive 2019/1937. In so doing, the Commission did not indicate in that opinion the reasons why it believed that the notified provisions were irrelevant.

39 Second, the Czech Republic, relying on the judgment of 8 July 2019, *Commission* v *Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573), recalls that it is for the Commission to establish the failure to transpose in the context of the procedure laid down in Article 260(3) TFEU an obligation which it does not satisfy by stating that the notified provisions do not contain a reference to Directive 2019/1937.

40 Furthermore, the administrative burden involved in examining the notified provisions cannot relieve the Commission of its obligation to prove the alleged failure to fulfil obligations.

*Findings of the Court*

– *Admissibility*

41 The Czech Republic considers, first, that the Commission extended the subject matter of the action at the stage of the application by pointing out in the application a complete lack of transposition of Directive 2019/1937 into national law whereas it referred, in the reasoned opinion, to an incomplete transposition of that directive.

42 It must be borne in mind that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under EU law and, on the other, to avail itself of its right to defend itself against the complaints formulated by the Commission (judgment of 19 September 2017, *Commission* v *Ireland (Registration tax)*, C-552/15, EU:C:2017:698, paragraph 28 and the case-law cited). Moreover, under Article 258 TFEU, the subject matter of an action for failure to fulfil obligations is determined by the Commission's reasoned opinion, with the result that the action must be based on the same grounds and pleas as that opinion. However, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, where the subject matter of the proceedings, as defined in the reasoned opinion, has not been extended or altered. In its application the Commission may, inter alia, clarify its initial complaints, provided, however, that it does not alter the subject matter of the proceedings (judgment of 16 April 2015, *Commission* v *Germany*, C-591/13, EU:C:2015:230, paragraph 19 and the case-law cited).

43 In the present case, it is apparent from the reasoned opinion of 15 July 2022 that the Commission criticised the Czech Republic for failing to adopt or communicate all the provisions necessary to transpose Directive 2019/1937, which that Member State does not dispute. In that regard, that Member State states that, in response to the said reasoned opinion, it sent to the Commission elements of its existing legislation which it claimed enabled certain provisions of that directive to be transposed.

44 In its application, the Commission, recalling that it considers that the transposition of a directive requires the adoption of a specific measure containing a reference to that directive, asks the Court to declare that the Czech Republic has neither adopted nor notified such an act and, consequently, has failed to fulfil its obligations under Article 26(1) and (3) of Directive 2019/1937.

45 It cannot therefore be considered that the Commission extended the subject matter of the application beyond that defined in the reasoned opinion of 15 July 2022.

46 Second, the Czech Republic submits that the Commission failed to state, with the necessary precision and clarity, the reasons why the provisions that it notified to it during the pre-litigation procedure as measures for the partial transposition of Directive 2019/1937 did not make it possible to reduce the subject matter of the failure to fulfil obligations complained of.

47 As has been recalled in paragraph 44 above, it is apparent both from the reasoned opinion and from the present action that the Commission criticises the Czech Republic for failing to adopt a specific measure transposing Directive 2019/1937 containing a reference to that directive, or to communicate such a measure.

48 In that regard, according to settled case-law, if a directive expressly requires Member States to ensure that the necessary measures transposing the directive include a reference to it or that such reference is made when those measures are officially published, it is, in any event, necessary for Member States to adopt a specific measure transposing the directive in question (judgment of 14 March 2024, *Commission* v *Latvia (European Electronic Communications Code)*, C-454/22, EU:C:2024:235, paragraph 33 and the case-law cited).

49 In the present case, however, the Czech Republic having stated both during the pre-litigation procedure and in its defence that a specific transposition measure referring expressly to Directive 2019/1937 was in the process of being adopted, it is common ground that there was no such measure on the date on which the action was brought.

50 Accordingly, that Member State cannot plead that the present action is inadmissible on the ground that it was not in a position to know the extent of the failure to fulfil obligations alleged against it, since, first, it itself initiated the national legislative procedure in order to comply with its obligations under Directive 2019/1937 and, second, the specific transposition measure whose adoption it announced was not due to enter into force until 1 August 2023, that is to say, almost 5 months after the present action was brought and more than 19 months after 17 December 2021, the date on which the deadline for transposing Directive 2019/1937 expired.

51 It follows that the present action is admissible.

– *Substance*

52 Under Article 26(1) of Directive 2019/1937, Member States were to bring into force, by 17 December 2021, the laws, regulations and administrative provisions necessary to comply with that directive. In addition, Article 26(3) of that directive stipulates that, when Member States adopt those measures, they are to contain a reference to that directive or be accompanied by such a reference at the time of their official publication. Moreover, pursuant to that Article 26(3), it fell to the Member States to communicate to the Commission the text of the said national provisions.

53 In accordance with settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, the Court being unable to take account of any subsequent changes (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 28 and the case-law cited).

54 Furthermore, as has been recalled in paragraph 48 above, if a directive expressly requires Member States to ensure that the necessary measures transposing the directive include a reference to it or that such reference is made when those measures are officially published, it is, in any event, necessary for Member States to adopt a specific measure transposing the directive in question (judgment of 14 March 2024, *Commission* v *Latvia (European Electronic Communications Code)*, C-454/22, EU:C:2024:235, paragraph 33 and the case-law cited).

55 In the case at hand, after having found that the Czech Republic had not communicated to it all the provisions necessary to transpose Directive 2019/1937 fully, the Commission sent that Member State, on 15 July 2022, a reasoned opinion, calling on it to comply with the obligations referred to therein within a period of two months of receipt of the opinion.

56 However, as is apparent from the defence and the rejoinder lodged by the Czech Republic in the present proceedings, on the expiry of that period, that Member State had not adopted all the laws, regulations and administrative provisions necessary to comply with Directive 2019/1937 and, therefore, nor had it communicated those provisions to the Commission.

57 However, it is apparent from its reply of 9 September 2022 and from the communication it made on 14 September 2022 that, on the latter date, the Commission had been the addressee of the provisions contained, inter alia, in the Civil Code, the Code of Administrative Procedure, the Labour Code and Government Regulation 145/2015, as measures for the partial transposition of Directive 2019/1937. The said Member State had also indicated to the Commission that certain provisions of that directive had already been transposed due to the compliance of national administrative practice with them and that several other provisions of that directive did not, in any event, require transposition. In addition, the Czech Republic had stated that the entry into force of a specific measure transposing the same directive was envisaged at the end of the first half of 2023.

58 In that regard, first, by indicating that the transposition of Directive 2019/1937 had to be completed in the course of 2023, the Czech Republic acknowledges that full transposition of that directive into national law had not been achieved either by the expiry of the period laid down in Article 26(1) thereof or by the expiry of the period laid down in the reasoned opinion, namely 15 September 2022.

59 Second, as regards the provisions of national law communicated to the Commission during the pre-litigation procedure, on the one hand, in the light of the case-law referred to in paragraph 54 above, the fact that the law of a Member State in force before the entry into force of Directive 2019/1937 already complied, according to that Member State, with that directive is not sufficient to exclude the obligation on that Member State to transpose that directive into its legal order and, therefore, to justify such a failure to fulfil obligations (judgment of 14 March 2024, *Commission* v *Latvia (European Electronic Communications Code)*, C-454/22, EU:C:2024:235, paragraph 42).

60 On the other hand, while it is true, as the Czech Republic emphasises, that it is for the Commission to prove the failure to fulfil obligations complained of, the fact remains that the Member States are required, under Article 4(3) TEU, to facilitate the achievement of the Commission's tasks, which consist inter alia, pursuant to Article 17(1) TEU, in ensuring that the provisions of the FEU Treaty and the measures taken by the institutions pursuant thereto are applied (judgment of 2 September 2021, *Commission* v *Sweden (Waste water treatment plants)*, C-22/20, EU:C:2021:669, paragraph 144 and the case-law cited).

61 It was only after the Commission had notified the letter of formal notice, however, that the Czech Republic began to notify that institution of provisions of its national law which would transpose certain provisions of Directive 2019/1937.

62 In addition, the communication of such provisions of national law continued throughout the proceedings, until 14 September 2022, that is to say, only one day before the expiry of the period laid down in the reasoned opinion, even though those provisions were in force in the Czech legal system before the adoption of that directive.

63 Third, it is necessary to recall that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the requirements of legal certainty which demand that, where the directive is intended to create rights for individuals, the beneficiaries should be enabled to know the full extent of their rights (judgment of 12 May 2022, *U.I. (Indirect customs representative)*, C-714/20, EU:C:2022:374, paragraph 59).

64 As the provisions of national law notified by the Czech Republic contain no reference to Directive 2019/1937, however, they cannot be regarded as satisfying the requirements set out in the preceding paragraph.

65 Moreover, in terms of the administrative practices put forward by the Czech Republic as a measure transposing Directive 2019/1937, it should be noted that a practice without adequate publicity is by its nature alterable at will by the authorities, such that it cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the FEU Treaty (judgment of 13 June 2024, *Commission* v *Hungary (Reception of applicants for international protection II)*, C-123/22, EU:C:2024:493, paragraph 81 and the case-law cited).

66 Fourth, in respect of the irrelevance of certain provisions of Directive 2019/1937 which the Czech Republic maintains need not be transposed into national law, suffice it to recall that such an assessment by a Member State is manifestly insufficient to relieve it of its obligation to adopt the laws, regulations and administrative provisions necessary to comply with a directive or its obligation to notify to the Commission the measures transposing that directive (judgment of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)*, C-550/18, EU:C:2020:564, paragraph 88).

67 It must therefore be held that, by having failed, on the expiry of the period prescribed in the reasoned opinion of 15 July 2022, to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 2019/1937 and, therefore, by having failed to communicate them to the Commission, the Czech Republic has failed to fulfil its obligations under Article 26(1) and (3) of that directive.

### *The application submitted under Article 260(3) TFEU*

*Arguments of the parties*

68 With a view to fixing the amount of the lump sum, the Commission relies on the general principles referred to in point 2 of the 2023 Communication and on the method of calculation set out in points 3 and 4 of that communication. In particular, that institution states that the

amount of the lump sum must be determined on the basis of the following fundamental criteria: the seriousness of the infringement, its duration and the need to ensure that the penalty has a deterrent effect in order to prevent repeat infringements.

69 With regard, in the first place, to the seriousness of the infringement, the Commission points out that the applicable coefficient under the 2023 Communication is between a minimum of 1 and a maximum of 20. That institution explains that, in accordance with point 3.2.2 of that communication, it systematically applies a coefficient for seriousness of 10 in the case of a complete failure to notify the provisions enabling a directive to be transposed, as any failure to transpose a directive or to notify those provisions is of the same degree of seriousness, regardless of the nature of the provisions of the directive concerned.

70 In the second place, as regards the duration of the infringement, the Commission explains that that equates, as regards the calculation of the lump sum, to the number of days that the infringement persists. That duration is calculated in accordance with point 4.2.1 of the 2023 Communication and corresponds to the number of days between the day following the expiry of the deadline for transposition of the directive in question and the day on which the infringement ceased.

71 As for, in the third place, the criterion relating to the need to ensure that the penalty has a deterrent effect taking into consideration the capacity of the Member State concerned to pay, the Commission states that that criterion is expressed by the 'n' factor set for each Member State in point 3 of Annex I to the 2023 Communication. It is calculated on the basis of the ratio between the GDP of the State concerned and the national average GDP of the European Union multiplied by the ratio between the population of that State and the national average population of the European Union. The first ratio is assigned a two-thirds weighting, whereas the second is assigned a one-third weighting. Pursuant to that point 3, the 'n' factor of the Czech Republic is 0.49.

72 Accordingly, the Commission proposes, pursuant to point 4.2 of the 2023 Communication, using a coefficient for seriousness of 10 and applying the 'n' factor of 0.49. The product of those two elements should be multiplied by the flat-rate amount of the lump sum fixed in point 2 of Annex I to that communication, that is to say, EUR 1 000, which amounts to a sum of EUR 4 900, to be multiplied by the number of days that the infringement has persisted, in accordance with point 4.2.1 of the said communication. The Commission states that the payment of that lump sum must be imposed provided that it is greater than EUR 1 372 000, the amount of the minimum lump sum fixed for the Czech Republic in point 5 of Annex I to the 2023 Communication.

73 In its defence, the Czech Republic submits that, in the assessment of the seriousness of the infringement, it is for the Commission to take account of existing national legislation. As the provisions notified during the pre-litigation procedure make it possible, according to that Member State, to transpose certain provisions of Directive 2019/1937, it is necessary to take them into account when fixing the amount of the lump sum by virtue of the principle of equal treatment, since the Commission must distinguish between cases of complete non-transposition and cases of partial non-transposition. It follows that the coefficient for seriousness cannot exceed 4.

74 In its additional claims of 28 May 2024, the Commission proposes, following the notification by the Czech Republic of the entry into force, on 1 August 2023, of Laws 171/2023 and 172/2023, taking the view that the number of days that the infringement persisted is between

18 December 2021, namely the day following the expiry of the deadline for transposition of Directive 2019/1937, and 31 July 2023, namely the day before the entry into force of the laws transposing that directive. It follows that the proposed daily amount of EUR 4 900 (10 × 0.49 × 1 000) is to be multiplied by the number of days that the infringement persisted, namely 591 days. The amount of the lump sum sought is therefore EUR 2 895 900.

75 The Czech Republic submitted, on 17 June 2024, observations by which that Member State considers that, having regard to the provisions partially transposing Directive 2019/1937, sent to the Commission during the pre-litigation procedure, as well as to the cooperation that it has shown, the coefficient for seriousness used should not exceed 3.

*Findings of the Court*

76 The first subparagraph of Article 260(3) TFEU provides that when the Commission brings a case before the Court pursuant to Article 258 TFEU on the ground that the Member State concerned has failed to fulfil its obligation to notify provisions necessary to transpose a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. In accordance with the second subparagraph of Article 260(3) TFEU, if the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation is to take effect on the date set by the Court in its judgment.

77 Since, as is apparent from paragraph 67 above, it is established that, on the expiry of the period laid down in the reasoned opinion of 15 July 2022, the Czech Republic had neither adopted nor, therefore, communicated to the Commission all the laws, regulations and administrative provisions necessary to transpose the provisions of Directive 2019/1937 into its domestic law, the failure thus established falls within the scope of Article 260(3) TFEU.

78 Furthermore, it should be recalled that the objective pursued by the system set out in Article 260(3) TFEU is not only to induce Member States to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, but also to simplify and speed up the procedure for imposing financial penalties for failures to comply with the obligation to notify national provisions transposing a directive adopted through a legislative procedure (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 57 and the case-law cited).

79 In order to achieve that objective, Article 260(3) TFEU provides for the imposition, inter alia, of a lump sum as a financial penalty.

80 The imposition of a lump sum is based on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period (see, to that effect, judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 59 and the case-law cited).

81 In that regard, the Commission states reasons for the nature and amount of the financial penalty sought, taking into account the guidelines which it has adopted, such as those in its communications which, although not binding on the Court, contribute to ensuring that the

action brought by the Commission is transparent, foreseeable and consistent with legal certainty (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 60 and the case-law cited).

82 As regards whether it is appropriate for a lump sum to be imposed, in each case, it is for the Court to determine, in the light of the circumstances of the case before it and according to the degree of persuasion and deterrence which appears to it to be required, the financial penalties that are appropriate, in particular, for preventing the recurrence of similar infringements of EU law (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 62 and the case-law cited).

83 In the case at hand, it must be found that, notwithstanding the fact that the Czech Republic cooperated with the Commission services throughout the pre-litigation procedure and that it communicated to it provisions of its existing law capable of constituting a transposition of certain provisions of Directive 2019/1937, all the legal and factual elements surrounding the breach of obligations established are an indication that if the future repetition of similar infringements of EU law is to be effectively prevented, a dissuasive measure must be adopted, such as the imposition of a lump sum. First of all, it was only after the Commission had notified the letter of formal notice of 27 January 2022 that the Czech Republic notified that institution of the provisions of its national law that it regarded as transposing certain provisions of Directive 2019/1937. Next, the notifications continued until 14 September 2022, that is to say, only one day before the expiry of the period laid down in the reasoned opinion of 15 July 2022, even though the notified provisions were in force in the national legal order before the adoption of Directive 2019/1937. Last, it should be noted that, until the entry into force, on 1 August 2023, of Laws 171/2023 and 172/2023, the notified provisions did not permit an effective, specific and full transposition of that directive, as has been recalled in paragraph 64 above.

84 As regards the calculation of the amount of the lump sum, it should be recalled that, under Article 260(3) TFEU, the Court alone has the power to impose a financial penalty on a Member State. However, in the context of proceedings brought on the basis of that provision, the Court has only a limited power to assess, since, where it finds that there is a failure to fulfil obligations, the Commission's proposals are binding on it as to the nature of the financial penalty which the Court may impose and the maximum amount of the penalty which it may set (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 67 and the case-law cited).

85 In exercising its discretion in the matter, as delimited by the Commission's proposals, it is for the Court to fix the amount of the lump sum which a Member State may be ordered to pay pursuant to Article 260(3) TFEU, in an amount appropriate to the circumstances and proportionate to the failure to fulfil obligations. Relevant considerations in that respect include factors such as the seriousness of the failure to fulfil obligations, the length of time for which the failure has persisted and the relevant Member State's ability to pay (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraphs 68 and 87 and the case-law cited).

86 It should likewise be remembered that, in the context of that discretion, guidelines such as communications from the Commission are not binding on the Court but rather contribute to ensuring that the Commission's own actions are transparent, foreseeable and consistent with

legal certainty when that institution makes proposals to the Court (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 69 and the case-law cited).

87 In the present case, the Commission relied on the 2023 Communication to justify its application seeking that the Czech Republic be ordered to pay a lump sum, as well as to fix the amount thereof.

88 In the first place, as regards the seriousness of the failure to fulfil obligations established, it follows from point 3.2 of the 2023 Communication that, according to the Commission, the failure to notify the provisions enabling the transposition of a directive adopted under a legislative procedure is always considered to be serious. Accordingly, that failure justifies the automatic application of a coefficient for seriousness of 10.

89 The Czech Republic contests the level of that coefficient and the automatic nature of its application in the circumstances of the failure established.

90 In that regard, it should be borne in mind that the obligation to adopt provisions for the purposes of ensuring that a directive is transposed in full and the obligation to notify them to the Commission are fundamental obligations incumbent on the Member States in order to ensure optimal effectiveness of EU law and that failure to fulfil those obligations must, therefore, be regarded as definitely serious (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 72 and the case-law cited).

91 In the present case, it must be observed that Directive 2019/1937 is a crucial instrument of EU law in that it lays down, pursuant to Article 1 thereof, read in conjunction with recital 1 thereof, common minimum standards providing for a high level of balanced and effective protection of persons reporting breaches of EU law in areas in which such breaches are likely to be particularly harmful to the general interest. By establishing a system for the protection of persons reporting breaches of EU law in a work-related context, that directive contributes to preventing harm to the public interest, in particularly sensitive areas, such as public procurement, the prevention of money laundering and terrorist financing, and the protection of the environment or of the financial interests of the European Union. Thus, the provisions of the directive provide for the obligation, for entities in both the public and private sectors, to establish internal reporting channels and procedures for receiving reports and their follow-up, whilst safeguarding the rights of the persons reporting breaches of EU law and the conditions under which those persons can qualify for the protection laid down therein (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 73).

92 The non-transposition of the provisions of Directive 2019/1937 within the period prescribed necessarily undermines EU law and its uniform and effective application, since breaches of EU law are unlikely to be reported if the persons with knowledge of such breaches are not protected against any retaliation (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 74).

93 That said, the amount of the financial penalties imposed on a Member State pursuant to Article 260(3) TFEU must be appropriate to the circumstances and proportionate to the failure to fulfil obligations (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 75), as has been recalled in paragraph 85 above.

94 It is for that reason that the Court has held that the automatic application of the same coefficient for seriousness in all cases in which a directive is not fully transposed and, therefore, the measures transposing that directive are not communicated necessarily precludes the amount of the financial penalties from being tailored to the circumstances characterising the failure to fulfil obligations and proportionate penalties from being imposed (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 76).

95 In that regard, the Court has specified that, by presuming that a failure to comply with the obligation to notify the transposition measures for a directive must be regarded as being of the same degree of seriousness regardless of the directive concerned, the Commission is unable to tailor the financial penalties according to the consequences of the failure to comply with that obligation on private and public interests, as is provided for in point 3.2.2 of the 2023 Communication (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 77).

96 In the present case, the Czech Republic submits, in its defence, that Directive 2019/1937 had already been partially transposed into Czech legislation.

97 By two communications, one of 21 March 2022 and the other of 14 September 2022, the Czech Republic notified to the Commission the provisions contained, inter alia, in the Civil Code, the Code of Administrative Procedure, the Labour Code and Government Regulation 145/2015, which that Member State claims permitted the transposition of 49 provisions of Directive 2019/1937.

98 In those circumstances, it must be found that it has not been established that the consequences of the failure established in the present case for private and public interests were as negative as in the case of a complete failure to transpose Directive 2019/1937 (see, to that effect, judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 92).

99 The fact remains that the Czech Republic itself acknowledges, in its defence, that, before the entry into force of Laws 171/2023 and 172/2023, the rules protecting persons who report breaches of the law were scattered throughout the Czech legal order and, contrary to the requirement laid down in Article 26(3) of Directive 2019/1937, did not make explicit reference to the protection of such persons.

100 The lack of clear and specific rules concerning the protection of persons who report breaches of EU law, as provided for in Directive 2019/1937, is a barrier to the effective protection of those persons and can, therefore, call into question the uniform and effective application of EU law in the areas covered by that directive (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 94).

101 As has been recalled in paragraph 91 above, by establishing a high level of protection of persons reporting breaches of EU law in a work-related context, that directive contributes to preventing harm to the public interest, in particularly sensitive areas, such as public procurement, the prevention of money laundering and terrorist financing, and the protection of the environment or of the financial interests of the European Union (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 95).

102 That being so, as has been stated in paragraph 92 above, without effective protection, persons with knowledge of a breach of EU law in such areas may be discouraged from reporting them where, by so doing, they may open themselves to retaliation (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 96).

103 Accordingly, in the light of the objective set out in Article 1 of Directive 2019/1937, read in conjunction with recital 1 thereof, the failure to adopt the laws, regulations and administrative provisions necessary to transpose the directive fully and precisely is particularly serious (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 97).

104 In the second place, when assessing the duration of the infringement, it must be recalled that, as regards the beginning of the period which must be taken into account in order to fix the amount of the lump sum, the relevant date for evaluating the duration of the infringement at issue is not the date of expiry of the period laid down in the Commission's reasoned opinion, but the date of expiry of the transposition deadline laid down in the directive in question (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 80 and the case-law cited).

105 It is established, however, that the Czech Republic had not, on the expiry of the transposition deadline laid down in Article 26(1) of Directive 2019/1937, that is to say, on 17 December 2021, adopted all the laws, regulations and administrative provisions necessary to ensure a specific and full transposition of that directive and, therefore, had likewise failed to communicate them to the Commission, contrary to what Article 26(3) of the said directive provides. It follows that the failure to fulfil obligations at issue, which ended only on 1 August 2023, with the entry into force of Laws 171/2023 and 172/2023, continued for more than a year and a half.

106 In the third place, as regards the ability to pay of the Member State at issue, it is clear from the case-law of the Court that, without prejudice to the possibility for the Commission to propose financial penalties which are based on multiple criteria, with a view, in particular, to allowing a reasonable gap between the various Member States to be maintained, it is necessary to rely on the GDP of that State as the predominant factor for the purpose of assessing its ability to pay and for the fixing of penalties that are sufficiently dissuasive and proportionate in order effectively to prevent a repeat of similar infringements of EU law in the future (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 81 and the case-law cited).

107 In that regard, the Court has repeatedly held that it was necessary to take account of recent trends in the Member States' GDP at the time of the Court's examination of the facts (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 82 and the case-law cited).

108 Here, the 'n' factor, which represents the capacity to pay of the Member State concerned as compared with the capacity to pay of the other Member States and is applied by the Commission in accordance with points 3.4 and 4.2 of the 2023 Communication, is defined as a weighted geometric average of the GDP of the Member State concerned, compared to the average of the Member States' GDPs, accounting for two thirds of the calculation of the 'n' factor, and of the population of the Member State concerned, compared to the average of Member States' populations, accounting for one third of the calculation of the 'n' factor, as is apparent from the equation set out in paragraph 9 above. The Commission justifies that method of calculating the

'n' factor both by reference to the objective of maintaining a reasonable gap between the 'n' factors of the Member States, as compared to a calculation based solely on Member States' GDPs, and the objective of ensuring a degree of stability in the calculation of the 'n' factor, since population is unlikely to vary significantly on an annual basis (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 83 and the case-law cited).

109 However, the Court has held that, when determining the capacity to pay of the Member State concerned, a demographic criterion cannot be taken into account in accordance with the detailed rules laid down in points 3.4 and 4.2 of the 2023 Communication as part of the method of calculating the 'n' factor (see, to that effect, judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraphs 84 to 86).

110 Accordingly, in accordance with the case-law recalled in paragraph 106 above and in the absence of a relevant criterion put forward by the Commission to ensure stability of calculation and to maintain a reasonable gap between the 'n' factors of the Member States, it is by taking into account the average GDP of the Czech Republic over the last three years that the amount of the lump sum should be fixed.

111 In the light of those considerations and having regard to the discretion conferred on the Court by Article 260(3) TFEU, which provides that the Court cannot, in respect of the lump sum, fix an amount exceeding that specified by the Commission, the view must be taken that, in order effectively to prevent a repeat of infringements similar to that resulting from the infringement of Article 26(1) and (3) of Directive 2019/1937 and undermining the optimal effectiveness of EU law in the future, a lump sum must be imposed, the amount of which must be fixed at EUR 2 300 000.

## Costs

112 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Czech Republic has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Commission.

113 Article 140(1) of the Rules of Procedure provides that the Member States and EU institutions which have intervened in the proceedings are to bear their own costs. In accordance with that provision, the Kingdom of Belgium shall bear its own costs.

On those grounds, the Court (Sixth Chamber) hereby:

1. **Declares that, by having failed, on the expiry of the period laid down in the reasoned opinion of the European Commission of 15 July 2022, to adopt all the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law and, therefore, by having failed to communicate them to the Commission, the Czech Republic has failed to fulfil its obligations under Article 26(1) and (3) of that directive;**

2. **Orders the Czech Republic to pay to the European Commission a lump sum in the amount of EUR 2 300 000;**

**3. Orders the Czech Republic to bear its own costs and to pay those incurred by the European Commission;**

**4. Orders the Kingdom of Belgium to bear its own costs.**

[Signatures]